

appear to be somewhat inflated it would be a matter of evidence for him to establish and if there is a serious question to be tried and the necessary criteria met, the court can protect him by way of the interlocutory injunction in advance of judgment.

The appellant still has to establish the second requirement, that is in order to gain the particular form of protection sought by the injunction he must show that there is a danger that the company's available assets will be dissipated to prejudice the appellant's claim. That is a matter of evidence. Our appreciation of the factual material before us leads us to the conclusion that the appellant really shows very little reason for thinking that the company cannot satisfy the judgment if it were unsuccessful. On the other hand, that is a matter which lies within the knowledge of the company and it has not made full disclosure of its affairs. The defendant in a suit or matter is not called upon to prove its solvency the moment it becomes a defendant and proceedings of this kind are not a means by the use of which it can be called upon to do so. We also take the view that there is no evidence of any intention on the part of the company to remove its assets out of reach of the appellant and we do not think any such evidence can be spelled out in such a way as to make it significant from the fact that the company is a subsidiary of Paremba Berhad. Moreover, that is not the case which the appellant presents for fearing that his judgment will be a barren one. His case rather is that the company has suffered losses in its hotel business and is generally impecunious. In other words, the danger envisaged is that if the hotel building is sold the proceeds thereof will simply disappear in discharging its liabilities and any surplus will go to Paremba Berhad. In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim. If an injunction were to be granted in this case it would be entirely ineffective to benefit the appellant, because the money would be held for the benefit of creditors generally, or the result would be that a plaintiff could require a defendant to set up a special fund to meet a claim not yet proved, or again the effect might be to give the particular plaintiff preference over the other creditors. We would in this connection also refer to the judgment of this court in *Yeng Hing Enterprise Sdn. Bhd. v. Liow Su Fah*⁽⁹⁾ (at page 244) and are accordingly unable to take the view that it would be proper in the circumstances to make the order sought by the appellant against the company. We think however that this is a fit case to order an early trial, and we so direct.

The appeal is dismissed with costs.

Appeal dismissed. I

Solicitors: *Sri Ram & Co.; Ariff & Co.*

KANAGALINGAM v. KANAGARAJAH

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.)
January 11 & 23, 1982]

[Kuala Lumpur — Federal Court Civil Appeal
No. 192 of 1981]

Family Law — Girl over eighteen years leaving home and going through form of marriage with a man — No consent of father for marriage — Girl staying with man — Application by father for habeas corpus — Welfare of infant — Wishes of infant — Registration of Marriage Ordinance, 1952, s. 4 — Guardianship of Infants Act, 1961, ss. 2, 3, 5 & 11.

Practice and Procedure — Girl over eighteen years staying with man with whom she went through ceremony of marriage — No consent of father — Application for habeas corpus — No affidavit by person restrained — Application by father but no statement that person restrained unable to make affidavit — Irregularity — Welfare and wishes of infant — Guardianship of Infants Act, 1961, ss. 2, 3, 5 & 11 — R.H.C., 1980 O. 54 rr. 1 & 2.

In this case the respondent had applied for an order that a writ of *habeas corpus* be issued directing the appellant to produce the respondent's daughter Rathika before the court to be delivered to him as the lawful father and guardian of the infant. The girl was over 18 years of age and had left her home to go through a form of marriage with the appellant. No consent of the respondent was obtained for the marriage. The application was made under Order 54 of the Rules of the High Court, 1980. The learned Judicial Commissioner who heard the application made an order directing that the girl be put in the care of her aunt, Mrs. Sivarajah, for a year or six months or longer pending further application. The respondent appealed.

Held: (1) the application was rightly made under Order 54 of the Rules of the High Court, which is the provision setting out how the power of the High Court under section 25 of the Courts of Judicature Act, 1964, should be exercised;

(2) in this case no affidavit by the person restrained or statement that the person restrained is unable to make the affidavit was produced; but this was an irregularity which did not nullify the proceedings;

(3) in this case the learned Judicial Commissioner failed to consider the wishes of the infant, which was a factor relevant to the determination of the welfare of the infant and to enable him to decide whether the respondent had made out a case for the issuing of directions in the nature of *habeas corpus*;

(4) in this case the infant was over eighteen years of age, intelligent and capable of making up her own mind as to what she felt best in her own interest;

(5) the infant should therefore be freed from all restraint and be at liberty to choose where she wishes to go.

Cases referred to:-

(1) *Munusamy v. Subramaniam & Ors.* [1969] 2 M.L.J. 108.

(1) *Saraswathi Ammal v. Dhanakoti Ammal & 3 Ors.* [1925] I.L.R. 48 Mad. 299.

FEDERAL COURT.

N. Ramachandran for the appellant.

K.S. Dass (*S. Balasekaram* with him) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): Under Originating Motion 23/81 at the High Court Muar Kanagarajah s/o Kandiah the applicant/respondent moved for an order that writ of *habeas corpus ad subjiciendum* be issued directing C. Kanagalingam the respondent/appellant to produce his daughter Rathika before the court to be delivered to him on the grounds that he is the lawful father and guardian

of the daughter born on September 3, 1963 allegedly taken away and kept by the appellant with a view to depriving him of the lawful custody of his daughter.

The proceedings were instituted pursuant to Order 54 of the Rules of the High Court, 1980.

The learned Judicial Commissioner sitting in the High Court, Muar, made an order on October 4, 1981 directing that Rathika be put in the care of Mrs. Siva @ Paliambihai d/o Suppiah, Tambun Height, Ipoh to stay for a year or 6 months or longer pending further application. The Social Welfare Officer was to be asked to visit the place to ascertain that the arrangement is working out well and to submit report. It is an appeal against that decision that is now before us.

Pending the disposal of the appeal, the appellant by notice of motion (*ex parte*) dated October 13, 1981 applied to a Judge of the Federal Court for an interim order that custody and care of Rathika be granted to him as husband. The Honourable the Chief Justice after hearing the application *ex parte* made the following orders:—

- “(i) That the custody and care of Rathika d/o Kanagarajah be granted to her husband the appellant C. Kanagalingam pending the disposal of this appeal.
- (ii) That Mrs. Sivarajah the aunt to whom custody of the said Rathika d/o Kanagarajah was given by order of the High Court, Muar do forthwith release the said Rathika d/o Kanagarajah to the appellant.
- (iii) That a copy of these proceedings and the order made herein be served on the respondent Kanagarajah s/o Kandiah to enable him if he so desires to apply to the full court to vary or discharge the said order.”

On October 17, 1981 in the Federal Court the respondent Kanagarajah applied for the interim order made on October 14 to be set aside. On October 30, 1981, the Federal Court after hearing the motion *inter partes* ordered that the order dated October 14, 1981 be set aside and that the order of the High Court, Muar be reinstated and that the custody and care of Rathika be restored to the father Kanagarajah.

We now deal with this appeal.

In his judgment the learned Judicial Commissioner considered the testimony given by Rathika to the effect that “her family was ill treating her, that she was in love with Kanagalingam and that in any case she had gone through some form of marriage ceremony with Kanagalingam in a temple at Maran. She did not want to go back to her parents but wanted to be with her ‘husband’. She admitted that her parents were against her marriage with Kanagalingam and at that ceremony none of them were present, nor that they had been informed of the plan to marry.” He concluded that the so-called ceremony was a device concocted to remove her from the custody and guardianship of her parents.

The learned Judicial Commissioner observed that counsel for Rathika never at any time raised any objection to the proceedings under Order 54 except that on October 8, 1981, four days after the order was made he wrote to the court requesting another hearing on the ground that Order 54 was *ultra vires* the powers of the rules committee and that the court should first ascertain whether the infant was actually

A married to Kanagalingam before giving its ruling.

In his judgment the learned Judicial Commissioner said and we quote —

“It is settled law that the guardian’s (in this case the father’s) consent is a necessary prerequisite to a minor’s marriage. Under the Registration of Marriages Ordinance 1952, section 4, any such marriage not under the Civil Marriage Ordinance, may be registered only if the Registrar, appointed thereunder, is satisfied that the parents, if living, shall appear before him, and declare on oath that they consent to the marriage though the Registrar may, if he is satisfied in all the circumstances, it is proper so to do, he may dispense with the consent of any parent or guardian.

The so called marriage at Maran Temple has not to the knowledge of the court been registered under the Registration of Marriages Ordinance 1952. Whatever the person who conducted the marriage ceremony at the Maran Temple alleged to be a marriage may have been advised he could not have lawfully married them unless the father was present and consented or clear proof was given to him that the father if absent did in fact, give his consent. On the girl’s evidence in this case, it is clear that it was not mere absence of consent but complete opposition to the marriage which was the vital consideration. The so called ceremony is a complete nullity and she remains a *feme sole* still under guardianship of her father.”

In passing we would observe that an application made under paragraph 1 of rule 1 of Order 54 must be supported by an affidavit by the person restrained showing that it is made at his instance setting out the nature of the restraint (paragraph 2 of rule 1 of Order 54). And where the person restrained is unable for any reason to make an affidavit required by paragraph (2), the affidavit may be made by some other person on his behalf and the affidavit must state that the person restrained is unable to make the affidavit himself and for what reasons (paragraph 3 of rule 1 of Order 54).

In the light of these provisions we are constrained to observe that this application was not supported by an affidavit by the person restrained. It may well be that sub-paragraph (b) of paragraph 1 of rule 1 permits an application to be made on behalf of an infant but such application must be made in the first instance to a judge otherwise than in court and the judge may direct that an Originating Summons for the writ be issued, or that an application therefor be made by Originating Motion; (Order 54 rule 2(1)(a)). It is also to be observed that if the affidavit in support of the application is to be made by the father as lawful guardian on behalf of the person restrained he must state the reason why the girl was unable to make the affidavit herself.

Notwithstanding that there was a failure to comply with the rules we are of the view that such failure amounted to only an irregularity and should not nullify the proceedings (Order 2 rule 1 paragraph (1); see also paragraph (2)).

Mr. Ramachandran counsel for the appellant has urged us to hold that Order 54 of the Rules of the High Court 1980 is *ultra vires* the provisions of the Courts of Judicature Act, 1964. With all respect we see no merit in the argument. Abdul Hamid J. (as he then was) in *Munusamy v. Subramaniam & Ors.*⁽¹⁾ dismissed the application made by way of originating summons for a writ of *habeas corpus* to be issued on the ground that the only written law relating to directions of the nature of *habeas corpus* is to be found in

Part XXXVI of the Criminal Procedure Code and therefore the proper procedure in that case would be for the applicant to apply under section 365 of the Criminal Procedure Code and not by the *ex parte* originating summons-in-chambers. That was the position then. He nevertheless held that the power of the High Court under section 25 of the Courts of Judicature Act, 1964 must be exercised in accordance with any written law or rules of court relating to the same. There was then no Order 54 as is now found in the Rules of the High Court 1980.

Now the merits. It is the appellant's contention that the learned Judicial Commissioner erred in law when he granted the application of habeas corpus proceedings when the girl was not unlawfully detained; she attained the consenting age and has claimed that she is not being detained against her will. It is also the appellant's contention that the learned Judicial Commissioner erred in law when he invoked section 4 of the Registration of Marriages Ordinance, 1954.

It is to be observed that the main ground, as far as we can gather from the grounds of judgment, that led the learned Judicial Commissioner to make the order that he did was founded essentially upon his finding that the so-called marriage was a complete nullity and she therefore remains a *feme sole*, still under the guardianship of her father. He held that consent is a necessary prerequisite to a minor's marriage under section 4 of the Registration of Marriages Ordinance, 1954. He also found that not only was there no consent but such marriage was completely opposed by the parents and this was of vital consideration.

It is pertinent to note that the learned Judicial Commissioner did not seem disposed to consider the wishes of the girl quite obviously for the reason that the girl is an infant for purposes of the Guardianship of Infants Act, 1961 (section 2 of the Act); that the father of an infant shall be the guardian of the infant's person and property (section 5 of the Act) and that the guardian of the person of an infant shall have the custody of the infant (section 3 of the Act). It would also appear that the learned Judicial Commissioner had borne in mind that the judge in exercising the powers conferred by the Act shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be (section 11 of the Act).

But what is significant to note is that whilst it is incumbent upon a judge to consider the wishes of the parent or parents as the case may be, the paramount consideration shall primarily be the welfare of the infant. The powers conferred by the provisions of the Guardianship of Infants Act are very wide and we are of the view that the judge in exercising such powers is not precluded from considering, indeed where necessary should consider the wishes of the infant to determine what serves best the interest and welfare of the infant.

It may well be the learned Judicial Commissioner was right in invoking section 4 of the Registration of Marriages Ordinance, 1952 and in arriving at the decision the marriage could not be registered for lack of

consent but we feel that it is also important to consider in dealing with an application for a writ of *habeas corpus* to gain custody of an infant the wishes of the infant who allegedly is illegally restrained, particularly as in this case where the infant is over 18 years of age and has attained the age of majority under the Age of Majority Act (Act 21) notwithstanding that she may still be an infant for purposes of the Guardianship of Infants Act, 1961. She is shown clearly to be a very talented and intelligent girl and has expressed in no uncertain terms in her testimony before the learned Judicial Commissioner that she wishes to stay with her husband, the appellant, and is not prepared to go anywhere else, and she would rather go to the welfare home if she cannot go back to the appellant. It was also her testimony that she left on her own free will as she loved the appellant. That testimony in addition to what we have to say shortly virtually puts an end to the application of this nature.

Mr. Ramachandran cited a number of cases in support of this appeal and has drawn our attention to the case of *Saraswathi Ammal v. Dhanakoti Ammal & 3 Ors.*⁽²⁾ which case, we think, coincides with the view we have formed in that in dealing with an application for a writ of *habeas corpus* by a guardian to recover custody what is of paramount importance for the court to consider is the welfare of an infant and in so doing special regard must not only be given to all the circumstances relevant to the determination of the infant's welfare including not only the wishes of the parent or parents but also the wishes of the infant in cases where the infant is intelligent and clearly capable of making up her own mind as to what she feels best in her own interests, more so where the infant has attained that age by reason of which she is capable to decide what is best for her.

The position that emerges in the instant case is somewhat similar to that in *Saraswathi's* case in that the very basis of *habeas corpus* is an illegal restraint and the application deals with the liberty of a subject. The question that calls for decision in this case, as in *Saraswathi's* case, is whether a case has been made out for the issuing of directions in the nature of *habeas corpus*. And we quote a passage in the judgment of that case at page 306 which reads:

"In each case the court must decide with reference to the interest and the welfare of the minor. If an infant capable of forming an intelligent opinion expresses its views, the court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the judge in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor."

Counsel for the respondent submitted that there is a moral issue involved referring of course to the marriage which the learned Judicial Commissioner found to be a nullity. Be that as it may, there was nonetheless ample evidence before the court that Rathika and the appellant went through a marriage ceremony according to Hindu rites at the Hindu Temple, Maran, Pahang. There was also a certificate of the marriage issued by the conducting priest and the Temple authorities. The girl was at the relevant time over the age of 18 and was in our view capable

of freely making up her own mind to marry the appellant.

In our judgment this case is not one in which the learned Judicial Commissioner had properly given regard to all the relevant factors. Clearly he failed to give due regard to the wishes of the infant, a factor relevant to the determination of the welfare of an infant, and to enable him to decide whether the respondent had made out a case for the issuing of directions in the nature of *habeas corpus*. It may also be noted that the order of the learned Judicial Commissioner did not quite reflect his finding that the infant remains a *feme sole* still under the guardianship of her father when he ordered the infant to be placed under the care of Mrs. Siva @ Paliambihai d/o Suppiah until such time the court trusts she will be willing to return to her parents' home.

For the reasons we have stated we would allow the appeal with costs. The order of the learned Judicial Commissioner is set aside and we substitute therefor an order that the infant be freed from all restraint and that she be at liberty to choose where she wishes to go.

Order accordingly.

Solicitors: N. Ramachandran & Co.; Bala & Co.

CHOOA E PEK & ORS. v. UN SIANG MEAD & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Syed Othman & Abdul Hamid F.J.J.) October 14, 1981 & January 29, 1982]
[Kuching — Federal Court Civil Appeal No. 52 of 1980]

Societies — Power of chairman to adjourn meeting — Meeting unruly and disorderly.

In this case the Kheng Chew Association held its annual general meeting in Kuching. The meeting became unruly and disorderly and the Chairman adjourned the meeting. Later the police came. The members of the Committee and other members left the premises. Before that some members asked the Chairman to continue with the meeting but he refused to do so. After the members of the Committee left, those members remaining decided to continue with the meeting. A pro-tem committee was elected and some business was conducted. The learned trial judge made declarations *inter alia* that the election of the pro-tem committee was invalid, that the purported vote of no-confidence against the respondents was invalid and that all proceedings taken after the adjournment of the meeting by the chairman were invalid. The appellant appealed.

Held: (1) the chairman of a meeting has power to adjourn a meeting which has become unruly and disorderly;

(2) the action of the pro-tem committee in this case was clearly wrong in the circumstances and the proceedings conducted by them were therefore null and void;

(3) the learned trial judge was right in his decision to grant the declarations.

Cases referred to:-

(1) *Tan Kah Wich & Ors. v. Datuk Phua Cheng Leong & Ors.* [1979] 2 M.L.J. 259.

(2) *Dias & Ors. v. Alfonso & Ors.* A.I.R. 1934 Sind. 180.

FEDERAL COURT.

Karpal Singh (Chan Kay Heng with him) for the appellants.

Chong Siew Chiang for the respondents.

Cur. Adv. Vult.

- A** Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): On December 12, 1971 the Kheng Chew Association held its annual general meeting at its premises at No. 38, Carpenter Street, Kuching. More than 90 members attended the meeting which was chaired by the vice-chairman as the 1st plaintiff/1st respondent had not completely recovered from his foot ailment to be able to preside over the meeting.
- B** After the chairman gave his speech questions were asked about various matters such as finance, previous minutes, rules and dismissal of members for failing to pay monthly subscriptions. It would seem that there were heated arguments on the last matter. Some members banged tables with bottles and glasses. The situation was confusing. The meeting had become unruly and disorderly and the chairman called for order but was unable to control it. So he pressed the bell and adjourned the meeting. Later the police came but no one knew who called the police. When the police left the premises members of the committee and other members also left. Before that some members asked the chairman to continue with the meeting but he was not prepared to do so. After the members of the committee left those members remaining in the premises decided to continue with the meeting. The five defendants/appellants were elected as members of the pro-tem committee. It would seem that 2nd defendant/2nd appellant stated in evidence that "before the appointment of the pro-tem committee the members had passed a vote of no confidence on the committee. The 1st defendant conducted the meeting." He went on to say that "after the chairman left, 1st defendant chaired the meeting and some business were transacted. I don't know whether any minutes of the meeting was recorded. There was no record book and no members signed their attendance at the pro-tem meeting."
- E**
- F**

The learned judge delivered a short oral judgment in the form of notes. He accepted that the meeting on December 12, 1971 was unruly and disorderly by the fact that police had to be summoned and the meeting had to be stopped. He considered that after the unruliness ceased the chairman should accede to the request of members to resume the meeting in order to complete the business of the day. He further considered that members had the right at common law to appoint a new chairman to complete the agenda. According to the learned judge the question of validity of the vote of no confidence and the appointment of the pro-tem committee would depend on the Rules of the Association. For authority he cited the decision of this court in *Tan Kah Wich & Ors. v. Datuk Phua Cheng Leong & Ors.*⁽¹⁾ He stated that the rules applicable to the meeting on December 12, 1971 were the rules approved by the Registrar in July 1971. In his view the vote of no confidence was null and void as it was in breach of rule 7(6) as no proper notice was given. Similarly, the election of the pro-tem committee was bad and therefore null and void. Except for the appointment of the new chairman other proceedings would be null and void. Accordingly, he made the following:—

- (1) A declaration that the purported vote of no confidence alleged to have been passed on December 12, 1971 against the plaintiffs as members of the